



STATE OF INDIANA

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October 29, 2012

Brian Vukadinovich
1129 E. 1300 N.
Wheatfield, Indiana 46392

Re: Formal Complaint 12-FC-289; Alleged Violation of the Access to Public Records Act by the Hanover Community School Corporation

Dear Mr. Vukadinovich:

This advisory opinion is in response to your formal complaint alleging the Hanover Community School Corporation ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Joanne Rogers, Attorney, responded on behalf of the School to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on August 27, 2012, you submitted a written request to the School for copies of "all fee agreements, itemizations, billings, statements, invoices, payment records, etc...from the law firm Nielson, Zehe, and Antas from June 2012 to the present." On September 25, 2012, the School denied your request in writing stating that the records requested were not being produced due to Nielson, Zehe, and Antas, P.C., was retained and is being paid by the School Corporation's insurer. The School further provided that it did not retain, nor was it paying for the legal services provided by Nielsen, Zehe, and Antas. You argue that the records are public records and the School has acknowledged that it does have the requested records in its possession. Thus, the records should be disclosed in response to your request.

In response to your formal complaint, Ms. Rogers advised that the firm of Nielsen, Zehe, and Antas, P.C., submits its billing directly to the Corporation's insurer. The School does not maintain possession of any records that are responsive to your request. The School did request from its insurer information concerning the annual premium amount paid by the Corporation for its Educators Legal Liability Policy. The Corporation's premium for the 2012 policy year is \$19,997. Ms. Rogers advised that information is the only information that you are entitled to.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The School is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the School’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

A “public record” means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2. Generally, the APRA does not require public agencies to produce records that the agency does not physically maintain. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”).

However, in 2005 the Court of Appeals in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005) (“*Knightstown*”), held that because a private entity created a settlement agreement *for* a public agency, the settlement agreement was a public record subject to disclosure under the APRA. *Id.* at 1134. The Court did not find that the language “created, received, retained, maintained or filed by or with a public agency” in I.C. §5-14-3-2 excepted from the definition records created *for* or *on behalf of* a public agency. Furthermore, the Court said it would amount to a tortured interpretation of the statute if private attorneys could ensconce public records in their file room in order to deny the public access. *Id.* at 1133. In other words, where records are created or maintained for a public agency but kept in the possession of an outside entity, the Court of Appeals ruled that the agency is obligated to retrieve the records and make them available for inspection and copying upon request. *Id.*; *see also Opinion of the Public Access Counselor 08-FC-223*; *10-FC-219*; and *11-INF-43*.

The School has provided that it does not physically maintain any of the billing records in question. The Court in *Knightstown* held that the fact that the agency never signed or received a copy of the record was immaterial to the determination of whether the record was a public record. *Knightstown*, 838 N.E.2d at 1134. (“...delegating the responsibilities of creating, receiving, and retaining the settlement agreement to outside counsel does not thereby remove the document from the statute’s definition of public document.” *Id.*). Regardless of whether the School maintains physical copies of the billing records involved, it is my opinion that they would still be considered public records as they are created and/or maintained by either the attorney and/or the insurance carrier for or on behalf of the School. While our office has previously opined such records are considered to be public records, it should also be noted that information contained within the billing records may be redacted if it is considered attorney-client privileged communication, attorney work product, or any other legally valid exception provided under state or federal law. *See Id.; Opinions of the Public Access Counselor 00-FC-16; 07-FC-317; 11-INF-43.*

CONCLUSION

For the foregoing reasons, it is my opinion that the billing records that have been requested would be considered public records of the School which should be disclosed in response to a request, minus any applicable exceptions. Accordingly, it is my opinion that the School acted contrary to the APRA in denying your request for records.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive, flowing style.

Joseph B. Hoage
Public Access Counselor

cc: Joanne Rogers